U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Date: July 3, 2001

Case No.: **2000-INA-286**
CO No.: **P198-NY-02365217**

In the Matter of:

BEST WESTERN HOTEL & CONFERENCE CENTER
Employer

on behalf of

ROBERT PSZENICZNY
Alien

Certifying Officer: Delores DeHaan
New York, New York

Appearance: Andrew J. Olshevsky, Esquire
Brooklyn, New York

Before: Vittone, Burke and Wood
Administrative Law Judges

DECISION AND ORDER

Per Curiam This case arises from the employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of an application for alien labor certification. The certification of aliens for permanent employment is governed by section 212(a)(5) of the Immigration and Nationality Act, 8 U.S.C.§1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20. This decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in the appeal file and any written arguments. 20 C.F.R. § 656.27 (c).

Statement of the Case

On November 7, 1996, Best Western Hotel & Conference Center ("Employer") filed an *Application for Alien Employment Certification* (ETA 750) to permit the employment of Robert Pszeniczny ("the Alien") as a "Cook." (AF 76-82). The application was signed by the Employer's Banquet Manager, the person identified as the Alien's immediate supervisor. Part B of the ETA 750, included the Alien's prior work experience and noted that he had been working for the Employer as a cook for the prior two years. *Id.*

After agreeing to increase its original wage offer of $10.00 per hour to the prevailing wage of $15.28 per hour, the Employer was instructed by the New York Department of Labor (NYDOL) to advertise the position. It was also instructed to thereafter file a recruitment report identifying all recruitment sources, stating the number and identity of U.S. workers who responded, enclosing a copy of all resumes received, stating the job-related reason for not hiring each U.S. applicant, and giving names of those who were interviewed and the job title of the person who interviewed them. (AF 25-27).

Five applicants were referred to the Employer as a result of its recruitment efforts: Eugene Officer, Dany Nia, Michael P. Brady, Charles E. Saint Hilaire and Robert Jackson. (AF 48-52). Mr. Saint Hilaire's resume identified the two places he had worked during the past 12 years together with the names and telephone numbers of what appears to be supervisors at each place. He also furnished both his home and work numbers. (AF 38). The cover letter to Mr. Jackson's resume furnished both home and message phone numbers. (AF 44). In the recruitment report, submitted on April 18, 1998, the Employer stated the following in regard to applicants Officer, Brady, Saint Hilaire and Jackson:

> Since the applicants Resumes did not contain specific information enabling the verification of information pertaining to professional experience and performance, the prospective employer forwarded letters to the above-listed four (4) applicants requesting that they produce verifiable professional references from places of their previous employment in the capacity of a Cook.
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> . . .
>
> The applicants failed to respond in a timely manner or to contact the employer in any way whatsoever. In light of an obvious lack of interest in the position offered, their applications for employment were rejected and *the rejections were based on exclusively job-related grounds.*

(AF 49-50) (emphasis in original). The Employer reported further that the fifth applicant, Mr. Nia, responded to its letter but then failed to report for a scheduled interview. A copy of a letter from Mr. Nia, dated March 28,1998, in which he furnished the name and address of an Employer for which he had worked for 13 years, was included with the report. (AF 48-49).

The CO issued a Notice of Findings ("NOF") on April 30, 2000, proposing to deny the application pursuant to §§656.24(b)(2)(ii), 656.21 (b)(6) and 656.20 (c)(8) of the regulations on the basis that it had not adequately document that applicants Officer, Jackson, Brady and Hilaire were rejected solely for lawful job-related reasons. (AF 58-60). Specifically, the CO found that Employer had failed to attach a copy of the letter sent to the applicants. The CO also found that "requesting applicants to furnish verifiable references, without first affording them an opportunity to be interviewed, does not appear to be customary business practice in considering applicants for employment." (AF 58-59). Finally, the CO noted that Employer had not documented any attempts to follow up the letters with phone calls. (AF 58).

Employer submitted its rebuttal on June 2, 2000. (AF 61-71). In this rebuttal, Employer cited *Matter of Kam Kuo Foods Corp.*1992-INA-395 (Oct 23, 1993) and *Matter of Sunree Kim's Enterprises*, 1987-INA-713 (July 22, 1988) and contended that under these holdings by the Board, the Employer had a right to request an applicant to furnish references and could lawfully reject them for failure to provide verification. It was argued further "that this applies especially in circumstances where the proffered rate of pay - as was in this case- is artificially inflated by the DOL- determined prevailing wage which attracts a significant number of applicants with highly questionable references and/or no references at all." (AF 69). In regard to the CO's finding that the recruitment report did not include copies of letters sent to each applicant, the rebuttal contended that the NYDOL had not instructed the Employer to include the same with its recruitment report and proceeded as follows:

> Attached please find copies of four (4) letters forwarded to the (4) DOL-listed applicants. As the enclosed shows, they were very much standard communications requesting mere producing verifiable references from place(s) of previous employment and neither their form nor contents may be considered prejudicial in any way whatsoever or indicating the employer's intention or attempt to discourage US-based workers.

(AF 67-68). The rebuttal states further that a number of telephone calls were placed to reach the applicants, such attempts failed "due to their absence at the telephone numbers provided by them in their Resumes[,]" and that such fact was not included in the recruitment report as the NYDOL's instructions did not specify or suggest telephone contacts with applicants. (AF 66). Submitted with the rebuttal were purported copies of letters addressed to each of the applicants, dated March 24, 2000. Further these letters had no employee of Employer listed, merely stating that it was from the Banquet Director. (AF 61-64).

On June 8, 2000, the CO issued a Final Determination denying the application for certification on the basis that the Employer had not adequately documented that applicant's were rejected solely for lawful job-related reasons. (AF 72-73). She noted in this regard that the validity of the rebuttal evidence submitted is questionable in light of the fact that the Employer had represented previously that letters had been mailed to applicants on March 25, 1998, but the copies of these letters included with the rebuttal are dated March 24, 2000. (AF 73).

The Employer has requested a review of the denial of its application and the record has been submitted to the Board for such purpose.

Discussion

The Board has held repeatedly that although the regulations do not explicitly state a "good faith" requirement in regard to post-filing recruitment, such a good faith requirement is implicit. *See, e.g. H.C. LaMarche Enterprises, Inc.* 87-INA-607 (Oct 27, 1988). Thus, it has been held that an employer must make efforts to contact and interview qualified U.S. applicants in a timely manner after receipt of resumes from the state agency and that its failure to do so indicates a failure to recruit in good faith. The Board has held also that a good faith effort to recruit may, in some circumstances, require attempts to contact qualified applicants by both telephone and mail. *Diana Mock*, 1988-INA-255 (Apr. 9, 1990). Additionally, a recruitment report must describe in detail the employer's attempts at contact of applicants. *Yaron Development Co., Inc.*1989-INA-178 (Apr. 19, 1991) (*en banc*); *Venk Jewelry*, 1989-INA-348 (July 30, 1990); *Hopewell Co.*, 1989-INA-178; (May 23, 1990). Good faith recruitment also requires that the employer not discourage applicants in its contacts with them, *Vermillion Enterprises*, 1989-INA-43 (Nov. 20, 1989) or place unnecessary burdens on the recruitment process, *Lin and Associates*, 1988-INA-7 (Apr. 14, 1989 (*en banc*)

Turning to the instant case, we note initially that the Employer's complaint, that it was not advised by the NYDOL that it was required to submit copies of the letters it sent to the applicants and that this is only a recent requirement of DOL, is without merit. Adequate and complete documentation of recruitment efforts has been a long standing requirement of the certification process. The rebuttal indicates that the person who drafted the same had familiarity with this Board's holdings, having cited cases to support the argument that it could lawfully request applicants to furnish references. The recruitment report included the verification of the mailing of Express Mail letters to the applicants even though such documentation was also not requested by NYDOL. We fail to see why these were submitted to show that something was mailed to the applicants without documenting by copies of the letter what was sent.

Of course, knowing what was sent to the applicants is essential to the certification process as it can not otherwise be determined whether the Employer has placed a "stumbling block" in the recruitment of U.S. workers. The CO was correct in requiring the Employer to submit copies of the letters. The Employer responded by indicating that it was submitting copies of the actual letters. It made no representation in the rebuttal, as it did in the request for review, that it did not have the originals in its files and was merely reconstructing what the letters had stated. As noted by the CO, these letters were each dated two years after their alleged mailing. We agree with the CO that the validity of the evidence submitted is questionable and leads to the conclusion that the Employer has not adequately documented that applicants were rejected solely for lawful job related reasons.

We note that even if the letters were accepted as genuine, they fail to show a good-faith

effort to recruit qualified applicants. The applicants were requested to furnish "verifiable professional references" without indicating whether this was to be merely a list of persons to contact or some form of written reference from former employers. As was pointed out by the Board in *John C. Meditz*, 1994-INA-572, the word "reference" has different shades of meaning. It could mean merely a list persons, with their addresses, who may be contacted by a prospective employer or a statement written by these persons. The fact that the Employer accepted Mr. Nia's response, as being sufficient to trigger his reportedly being invited to be interviewed, leads to the conclusion that it was only interested in receiving only a list and not written statements from former employers. The Employer's representations that the each of the other applicants' resumes did not contain specific information enabling the verification of information pertaining to their experience is simply not true. Apparently the resumes were not carefully read. As noted above, Mr. Saint Hilaire's resume included the specific information it was seeking. It follows, then, that the Employer placed a "stumbling block" in the way of at least Mr. Saint Hilaire by requesting that he supply the information that he had already furnished. This alone constitutes an unlawful rejection of an apparently qualified applicant.

There is an additional reason for the denial of the application which we consider to be embraced by the CO's rejection of the Employer's rebuttal evidence for lack of veracity. This relates to the telephone follow-up issue raised in the NOF. The Employer maintains in the rebuttal that it did place a number of phone calls in an attempt to contact applicants but that the applicants could not be reached in such fashion. However, the recruitment report makes absolutely no mention of any phone calls having been made to any applicant with the exception of Mr. Nia. The rebuttal gives no details as to who made these alleged calls or when they were made, facts which should have been included in the recruitment report. There is even confusion in this record as to who was doing the recruiting here. The ETA 750 is signed by the Banquet Manager, who is shown to be the Alien's supervisor; the purported letters seeking references are signed "For" the Banquet Director; the postmark indicates that they were mailed from Employer's counsel's Brooklyn location rather than the Employer's Hempstead base; the recruitment report is prepared by counsel and purportedly countersigned "For" the Sales Director; and the rebuttal representing that the phone calls were made is then again signed "For" the Banquet Director. There is no acceptable evidence here to establish that these phone calls were ever made.

We wish to make one last observation. We firmly disagree with Employer's claim that its having to pay the prevailing wage for the position attracts unqualified candidates. To the contrary, the necessity for having to pay a prevailing wage for the position places the Employer in a competitive position to attract workers ready, willing and able to fill a position which an employer has not previously been able to do with U.S. workers. Employer's paying the Alien two-thirds of the salary it must pay U.S. workers indicates that its recruitment efforts should be carefully scrutinized to be sure that they are *bona fide*.

The application for certification was properly denied in this case.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered on behalf of the Panel:

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Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity in its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, DC 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.